

No. 2260.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

APPEAL IRVINE SMITH,

*Appellant,*

*vs.*

THE JAMES IRVINE FOUNDATION, a corporation, *et al.*,

*Appellees.*

Appeal From the United States District Court  
Central District of California.

## BRIEF FOR APPELLEE.

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FILED

JUL 29 1964

WM. B. LUCK, CLERK



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No. 22607

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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ATHALIE IRVINE SMITH,

*Appellant,*

*vs.*

THE JAMES IRVINE FOUNDATION, a corporation, *et al.*,

*Appellees.*

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Appeal From the United States District Court  
Central District of California.

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## BRIEF FOR APPELLEE.

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### Introductory Statement.

Defendant Thomas C. Lynch, Attorney General of the State of California, adopts the statement of the case set forth in the brief of the defendant The James Irvine Foundation in lieu of setting forth a separate statement of the case herein. In addition, this defendant adopts the arguments set forth in said brief of defendant The James Irvine Foundation and will confine the instant brief to the question of the validity of the Trust Indenture of February 24, 1937.

The substance of the plaintiff's argument as to the invalidity of the instant trust is that it was created for

non-charitable as well as charitable purposes and since no segregation of corpus is made for each purpose it must fail in its entirety as an unauthorized perpetuity.

We have no quarrel with the assertion that a trust cannot be established to exist in perpetuity for both charitable and noncharitable purposes. We do take issue with the plaintiff's contention that the existence in the trust instrument of provisions regarding investment of income in addition to those provisions regarding contribution of income serve to make the trust one for non-charitable as well as charitable purposes.

We shall see in the following discussion that a fair reading of the Trust Indenture discloses its purpose to be solely charitable; that the plaintiff's interpretation would convert a provision regarding the administration of the trust into an object of the trust.



## ARGUMENT.

The Ruling of the Trial Court That the Indenture of Trust Dated February 24, 1937 Between James Irvine and The James Irvine Foundation Created a Valid and Effective Trust for Charitable Purposes Is Sound.

(a) The Plaintiff's Comments Regarding Use of the Word "charitable" in the Trust Instrument Are Inconsequential.

Preliminarily we should dispose of the plaintiff's comments that the word "charitable" has not been inserted in the Trust Indenture as often as the plaintiff believes necessary to create a charitable trust. Thus the plaintiff's initial attack is that the trustee is referred to in the above instrument merely as a corporation and not as a "charitable" corporation. (Brief for Appellant p. 58.) This, of course, is wholly immaterial for the charitable nature of The James Irvine Foundation is manifest from its articles of incorporation and was not in dispute in 1937 or thereafter. Thus there was no reason to use the adjective "charitable" whenever reference was being made to the corporation.

In addition, the nature of the trust created by the above instrument does not depend upon the character of the corporate trustee, for it is not essential that a corporation be a charitable one in order to hold property subject to a charitable trust. Calif. Corps. Code §9501(d).<sup>1</sup> See, *Estate of Henderson*, 17 Cal. 2d 853,

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<sup>1</sup>"Every non profit corporation may:

" . . .

"Act as trustee under any trust incidental to the principal objects of the corporation, and receive, hold, administer, and expend funds and property subject to such trust."

859, 112 P. 2d 605; *Estate of Willey*, 128 Cal. 1, 60 Pac. 471.

Similarly, the plaintiff's observation, at page 59 of her brief, that the trust instrument refers to "trust uses and purposes" rather than "charitable trust uses and purposes" is of no consequence since it is not the labeling or description of a purpose that makes it charitable or noncharitable. Rather, it is whether or not the purpose expressed fulfills the legal definition of charity that is controlling. See *Estate of Robbins*, 57 Cal. 2d 718, 724, 361 P. 2d 573.

**(b) The Construction of the Language of the Trust Instrument Advanced by Plaintiff Is Wholly Unreasonable.**

It appears to be plaintiff's position that the essential purpose of the trust, created by the trust indenture of February 24, 1937, was to accumulate corpus in perpetuity; that inasmuch as this is not a charitable purpose the trust is invalid as being an unauthorized perpetuity. The plaintiff refers to the provisions of the indenture (1) directing the trustee to apply income for the administrative expenses of the trust and to replace losses suffered in the trust corpus; (2) allowing the trustee in its discretion to set aside out of the balance of income such sums as it deems wise for investment which investments, when made, shall become part of the corpus of the trust; (3) directing the trustee to apply the balance of said income for the advancement of charitable purposes in the State of California.

The plaintiff baldly assumes the provisions regarding distribution of income for charitable purposes are subordinate to the provisions regarding investment of income and argues that since the trustee has unrestricted

discretion to devote income to investments the trust cannot be regarded as wholly charitable. (Brief for Appellant, pp. 61-63.)

A review of the trust indenture [Ex. A-1] discloses that the plaintiff's reading of that instrument is an unnatural one and that her conclusions are unsound.

Taking the approach of plaintiff, for the moment, of concentrating on particular wording, we note that the language of the indenture allowing application of income to investment commences with, "2. Out of the balance of said income," whereas the language referring to devoting income to charity commences with, "3. The balance of said income." (Indenture of Trust, pp. 4, 5.) We believe the difference in this language of these paragraphs is highly significant. The words opening paragraph number 2 connote the source from which *some* funds may be taken for investments whereas the words opening paragraph number 3 indicate that the trustor contemplated and intended that there would remain income to be applied for charitable purposes. Thus it cannot be concluded, as the plaintiff urges, that the trustee is given the power to invest *all* the income, following the deduction of expenses, and leave nothing to be distributed for charity.

In addition, while the trustor has set forth in the trust instrument directions as to the management of the ranch property, to which he had dedicated the greater portion of his life, he also set forth in unmistakable terms the charitable purposes to be advanced through the prudent management of the trust property, to wit:

"The Trustor has no intention or desire to restrict the Trustee in its selection of the specific

charities to be benefitted by this trust, nor to make any exclusive designation thereof. Nevertheless, the Trustor interprets the charitable purposes of The James Irvine Foundation as stated in its Articles of Incorporation to include financial aid generally to worthy individuals, who through illness or misfortune are temporarily in need. There is, for example, a very large body of selfrespecting citizens who are not wealthy enough to afford for their families and themselves that same high quality of medical and surgical and hospital care which is open to the wealthy and also the very poor. It is the desire and hope of the Trustor that The James Irvine Foundation may find a means of extending such temporary aid to as many as possible of these worthy individuals and families, and in so doing, that worthy citizens and families residing in Orange County, California, be not overlooked.

“The Trustor also suggests that a revolving fund be created for loans not to exceed in the aggregate One Thousand (\$1,000.00) Dollars per person, with very moderate rates of interest, to worthy students and scholars who are in need of financial aid to carry on their studies in institutions of learning in California, and also in moderate amounts to scientists or individuals engaged in research work who require financial assistance therein.

“It is also the direction of the Trustor that charities receiving the substantial part of their support from taxation should not be beneficiaries of any of the property derived from this trust, but

that all such property, available from time to time for the benefit of charities, shall be used for such charities as do not enjoy any substantial support through taxation.” (Indenture of Trust, pp. 9-10.)

Thus it is clear from the language of the trust instrument that the paramount concern of the trustor was the devotion of the trust income to charitable purposes. His businesslike interest in providing that the income shall be applied for trust expenses and that some of it may be used to enhance the trust corpus does not contradict or make uncertain the manifest charitable purpose for which this trust was created.

**(c) The Plaintiff Has Failed to Distinguish the “Power” of the Trustee From the “Purpose” of the Trust.**

Reading the trust instrument as a whole, as we are required to do,<sup>2</sup> it is clear that it cannot reasonably be interpreted as creating a trust for the purpose simply of enlarging the trust corpus. Rather, its *purpose* is the distribution of funds for charity. This being so, the *power* of the trustee to apply income to investments is necessarily circumscribed thereby.

Powers of a trustee exist to carry out the trust objective. They may not be exercised independently and in opposition to the purpose of the trust. They are subordinate to the purpose of the trust and must be exercised in a manner that will further that purpose. Thus, in the analogous situation, where a corporation contended

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<sup>2</sup>“The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.” Calif. Civil Code § 1641. See *Moore v. Wood*, 26 Cal. 2d 621, 160 P. 2d 772; *Kraemer v. Kraemer*, 167 Cal. App. 2d 291, 334 P. 2d 675.

it was organized exclusively for charitable purposes and was therefore exempt from certain taxes and the taxing authorities argued that the powers of the corporation as expressed in its articles are not limited to the tax exempt purposes, the appellate court pointed out:

“The powers of a religious or charitable corporation are construed with reference to the purposes of its corporate existence. The statement in the articles of the objects, purposes, and powers of the corporation constitutes a limitation on the actual authority of the representatives of the corporation as between it and the state. (Corp. Code, § 803.) Powers are to be deemed ancillary to the purposes and are limited thereby. (General Conference of Free Baptists v. Berkey, 156 Cal. 466, 469-70 [105 P. 411]; Ballentine, California Corporation Laws, 171, §§ 184, 187; 46 Harv. L. Rev. 1337.)”

*House of Rest v. County of Los Angeles*, 151 Cal. App. 2d 523, 528, 312 P. 2d 392.

Again, with regard to some very problematical language concerning the powers of a corporation which was regarded by the taxing agency as not restricting the corporation's assets to charitable purposes, the Supreme Court held:

“. . . The statement in the articles that the ‘enumeration of specific powers shall not be held to limit or restrict in any manner the powers of this corporation’ does not purport to be a general grant of power. Rather it appears to be a precautionary clause to signify that the incidental powers reasonably necessary to effectuate plaintiff's main pur-



poses shall not be limited by their specific enumeration. (See 7 Fletcher Cyclopedica Corporations, Perm. ed., ch. 42, § 3648, p. 780.) It does not give plaintiff any powers except such as are specifically conferred by the articles and those given by statute. Such powers are not unlimited powers, but are subordinate to plaintiff's main objects and purposes, which are wholly charitable." *Pacific Home v. County of Los Angeles*, 41 Cal. 2d 844, 850-51, 264 P. 2d 539.

So too in the case at bar, the discretion regarding investments is a *power* of the trustee relating to administration of the trust. As such, it cannot interfere with the *purpose* of the trust nor derogate from the charitable nature thereof.

**(d) The Discretionary Actions of a Trustee Are Not Beyond Judicial Review and Correction.**

For any abuse of discretion in the exercise of its powers the trustee would be subject to account in an action brought by the Attorney General.

"A nonprofit corporation which holds property subject to any public or charitable trust is subject at all times to examination by the Attorney General, on behalf of the State, to ascertain the condition of its affairs and to what extent, if at all, it may fail to comply with trusts which it has assumed or may depart from the general purposes for which its formed. In case of any such failure or departure the Attorney General shall institute, in the name of the State, the proceedings necessary to correct the non-compliance or departure." Calif. Corp. Code § 9505.

See, *Pacific Home v. County of Los Angeles*, *supra*, 41 Cal. 2d 844, 854, 264 P. 2d 539; *House of Rest v. County of Los Angeles*, *supra*, 151 Cal. App. 2d 523, 529, 312 P. 2d 392; *Estate of Mayer*, 237 Cal. App. 2d 549, 553, 47 Cal. Rptr. 44.

In insisting that the trustee's discretionary power to invest income is limited by its duty to carry out the purpose of the trust we are not unmindful of paragraph 4 of the indenture (p. 7) reciting that the discretions conferred upon the trustee unless specifically limited shall be absolute. That paragraph does not purport to give the trustee power to invest income without any limitation for there is the inherent limitation that the trustee's discretion cannot be exercised to defeat the very purpose of the trust. In short, neither paragraph 4 nor any other provision of the indenture purports to allow the trustee to substitute the power regarding investment for the purpose of the trust.

"A trust created by will is properly controlled by the expressed intention of the testatrix; the particular language used is always important but the purpose of a trust is to be carried out no matter what the document says about the trustee's discretion. . . ."

*Estate of Miller*, 230 Cal. App. 2d 888, 907, 41 Cal. Rptr. 410.

See, *Estate of Ferrall*, 41 Cal. 2d 166, 176-77, 258 P. 2d 1009.

". . . it is beyond question that the issues of bad faith, fraud or abuse of discretion are always ap-



propriate in a court review of the actions of a trustee vested with absolute discretion . . .”

*Estate of Patten*, 217 Cal. App. 2d 167, 171, 31 Cal. Rptr. 767.

See, *Coberly v. Superior Court*, 231 Cal. App. 2d 685, 688-89, 42 Cal. Rptr. 64.

The plaintiff's fear, then, that the trustee may decide to abandon the purpose of supporting charities and instead devote itself to the sterile end of expanding corpus is groundless. It is well established that the courts will enforce charitable trustees, *In re Los Angeles County Pioneer Society*, 40 Cal. 2d 852, 257 P. 2d 1; *Mosk v. Summerland Spiritualist Assn.*, 225 Cal. App. 2d 376, 37 Cal. Rptr. 366; *Brown v. Memorial Nat. Home Foundation*, 162 Cal. App. 2d 513, 329 P. 2d 118, and, as the above quotations indicate, improper acts of a trustee are not rendered immune from judicial scrutiny merely because the trustee has been given discretion in administering the trust.

**(e) It Is the Policy of the Law to Prefer the Construction That Gives Effect to Legal Instruments and to Favor Transfers to Charity.**

Even if we were to concede for purposes of argument that the trust instrument is susceptible to the rather strange construction placed upon it by plaintiff, the applicable rules of construction and policy of the law would require we reject that construction in favor of one at least as reasonable which gives legal effect to the intent of the trustor and upholds the trust.

“A contract must receive such an interpretation as will make it lawful, operative, definite, reason-

able, and capable of being carried into effect, if it can be done without violating the intention of the parties." California Civil Code § 1643.

" . . . Where two interpretations are possible, one rendering the contract valid and the other rendering it illegal, the former, under elementary principles, is to be preferred."

*Entremont v. Whitsell*, 13 Cal. 2d 290, 297, 89 P. 2d 392.

Also applicable in determining the proper construction to be placed upon the indenture of trust before us is the policy of our law favoring transfers to charity.

" 'Courts look with favor upon all attempted charitable donations, and will endeavor to carry them into effect if it can be done consistently with the rules of law. A bequest intended as a charity is not void, and there is no authority to construe it to be legally void, if it can possibly be made good.' (Estate of Hinckley, 58 Cal. 457, 513; Collier v. Lindley, 203 Cal. 641, 654 [266 P. 526]; Estate of Bunn, 33 Cal. 2d 897, 903 [206 P. 2d 635]; see 14 C.J.S. § 6a, p. 427.) . . ."

*Estate of Tarrant*, 38 Cal. 2d 42, 46, 237 P. 2d 505.

See *Estate of Moore*, 190 Cal. App. 2d 833, 839, 12 Cal. Rptr. 436.

While the above statement of the Supreme Court was originally made with regard to a testamentary trust, neither reason nor legal precedent confine it to that form of trust. Indeed, the same statement is quoted

in the opinion of *Collier v. Lindley*, 203 Cal. 641, 645, 266 Pac. 526, which involved an *inter vivos* trust.

In accordance with these fundamental rules for construction of written instruments and the relevant policy of the law regarding charity, it is far more reasonable to construe the indenture of trust as giving the trustee the discretion to enhance the trust corpus by occasional investments of a portion of the trust income rather than the extraordinary power to invest the total income indefinitely for the sole purpose of enlarging the corpus. Plaintiff herself in urging the latter construction simultaneously, urges the reason for its rejection—it would result in defeating the trust and therefore cannot be favored over the construction that renders it valid and effective.

**(f) The Construction Placed Upon the Trust Instrument by the Foundation Throughout Its Operation Evidences Its Charitable Purpose.**

In construing the trust indenture we may properly look to that construction placed upon the instrument by the parties concerned with it these many years.

“ . . . a construction given the contract by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight and will, when reasonable, be adopted and enforced by the court. (Citations omitted). . . .”

*Woodbine v. Van Horn*, 29 Cal. 2d 95, 104, 173 P. 2d 17.

See,

*Burns v. Peters*, 5 Cal. 2d 619, 623, 55 P. 2d 1182;

*Davenport v. Davenport Foundation*, 36 Cal. 2d 67, 222 P. 2d 11.<sup>3</sup>

The defendant Foundation in distributing great sums to charity for some thirty years has indicated unequivocally it realizes the trust purpose is not the methodical increase of the trust corpus but the advancement of charitable purposes through contributing funds to established charities. Its construction of the trust instrument is both reasonable and persuasive.

The radical construction of the trust instrument offered by plaintiff finds no support in the language of the instrument viewed as a whole, or in the conduct of the trustee in all the years it operated the trust under said instrument. Rather, the instrument itself and the conduct of the trustee contradict the argument of the plaintiff and support the conclusion, unchallenged since its execution, that the trust indenture was intended to and did create a valid charitable trust.

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<sup>3</sup>In *Davenport* the court concluded that the trust was created for the benefit of the trustor's descendants as well as for charitable purposes and therefore was in violation of the rule against perpetuities and void. However, in coming to this conclusion, the court applied the above rule in *Woodbine*, stating at pages 73-74, ". . . The trust was administered by the trustees with the assistance of the trustor for eight years before his death. The practical construction they placed upon the document is entitled to great weight in its interpretation."

(g) The Exclusion of Tax Supported Charities as Donees of the Trust Has No Bearing Upon the Charitable Purpose of the Trust.

The plaintiff has also taken the position that because of the direction in the trust instrument “. . . that charities receiving the substantial part of their support from taxation should not be beneficiaries of any of the property derived from this trust . . .” the trust does not qualify as a charitable one. In so concluding the plaintiff states “that public objectives and uses and purposes are fundamental to the validity of a charitable trust” and notes that the above quoted provision precludes support to public schools and institutions of the State of California. (Brief for Appellant, p. 28.)

The above conclusion of the plaintiff is unsound for while a charitable trust is one which is for the community or public benefit, Bogert, *Trusts & Trustees*, 2d Ed. § 369, p. 62; Scott on Trusts, 2d Ed. Vol. IV § 348, p. 2553; *Estate of Hart*, 151 Cal. App. 2d 271, 284, 311 P. 2d 605; *Estate of McKenzie*, 227 Cal. App. 2d 167, 172, 38 Cal. Rptr. 496, *Estate of Henderson*, 17 Cal. 2d 853, 857, 112 P. 2d 605, it does not follow that excluding tax supported charitable organizations from the bounty of this trust deprives the public of the benefit of the trust. In the very substantial contribution of income to various charities over many years the public has benefited greatly from this trust administered by the Foundation. The plaintiff has cited no authority and we are unaware of any that requires tax

supported institutions be eligible for trust contributions in order that the trust be recognized as charitable. Indeed, charities traditionally have come into existence to benefit the public in areas where government has not functioned or has functioned only slightly. As such they complement rather than compete with government in benefiting the public. The distinction then between tax-supported and other charities made in the trust instrument is quite understandable and properly within the judgment of the trustor.

Thus the restriction of contributions from the trust to charities not receiving substantial tax support does not impair the validity of this charitable trust.

### Conclusion.

An objective reading of the indenture of trust fails to disclose that its purposes are other than charitable. The strained construction placed upon it by the plaintiff derives not from the language of the trust instrument but from advocacy alone. For this reason and those set forth in the brief of The James Irvine Foundation we urge that the plaintiff's contentions be rejected and that the judgment of the trial court be affirmed.

Respectfully submitted,

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